A

Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan v Low Koh Hwa @ Low Kok Hua (practicing as the sole certified architect for Low & Associates)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(C)(A)-202–01 OF 2021 AND B-02(C)(A)-203–01 OF 2021
NOR BEE ARIFFIN, SUPANG LIAN AND AHMAD ZAIDI IBRAHIM JJCA
15 NOVEMBER 2022

C

Arbitration — Award — Setting aside — Whether High Court was wrong to set aside entire arbitral award just because two decisions within it were outside the jurisdiction of the arbitrator — Whether court should have applied s 37(3) of the Arbitration Act 2005 ('the AA') to sever and set aside only the 'bad' parts of the award and affirm the remaining awards — Whether High Court wrongly set aside arbitral award on ground arbitrator had breached s 14 of the AA for not disclosing fact that he knew a witness who was going to testify — Whether notes of proceedings showed arbitrator did in fact made full disclosure and gave parties time to challenge his impartiality or independence under ss 14(3) or 15(1) of the AA — Whether failure of parties to challenge arbitrator at material time estopped them from questioning his appointment after arbitration decision had been made

D

E

F

The appellant ('PKKS') had a dispute with the respondent ('LKH'), an architect, over the balance of professional fees that was due to him for services rendered on a project. The parties referred the dispute to an arbitrator for resolution. At the end of the first day's hearing, after LKH had given evidence, the arbitrator informed LKH that he was acquainted with the next witness who was going to testify for PKKS, namely a Dr Mohinder Singh ('Mohinder') and that in view of that fact, he would adjourn the proceedings to another date to give LKH an opportunity to engage a lawyer for the proceedings or decide on his next course of action. On the adjourned date, LKH appeared with his lawyer but they did not object to the arbitrator continuing to preside over the arbitration until its conclusion. At the end of the proceedings, the arbitrator decided in favour of PKKS and ruled that: (a) LKH was only entitled to claim RM747,250 as his professional fees from PKKS and that he was estopped from claiming any amount as professional fees in excess of that figure; (b) PKKS had overpaid LKH RM72,750 and that sum had to be refunded by LKH to PKKS with interest thereon at 5%pa from the date of the arbitration award until the sum was fully paid ('the overpayment and refund of same with interest award'); and (c) LKH had to bear the costs of the arbitration. LKH applied to the High Court under s 37(1) of the Arbitration Act 2005 ('the AA') to set aside the

G

H

I

arbitral award whilst PKKS applied under s 38(1) of the AA to register the award as a judgment to enforce the same. The High Court allowed LKH's application and set aside the whole arbitral award. PKKS's application was, consequently, dismissed. The High Court decided that the 'overpayment and refund of same with interest' award was outside the arbitrator's jurisdiction to make as it fell outside the 'Terms of Submission to Arbitration'. The court, however, decided that it could not sever the said impugned award from the rest of the awards and quash it under s 37(3) of the AA and, therefore, had to set aside the whole arbitral award. The court also held that the arbitrator had breached s 14 of the AA by not making 'full and timeous disclosure' of the fact that he knew Mohinder right at the commencement of the arbitration proceedings as the disclosure was only made after LKH had testified. Consequently, the court held, 'public policy' was breached and for that reason the whole arbitral award had to be set aside under s 37(1)(b)(ii) of the AA.

Held, unanimously affirming the High Court's setting aside of the 'overpayment and refund of same with interest' award, reinstating all other awards that were made in the arbitral award and allowing PKKS's appeal to register and enforce the arbitral award as amended:

(1) The High Court judge did not err in setting aside the 'overpayment and refund of same with interest' award in the arbitral award as the same was outside and beyond the scope of the 'Terms of Submission to Arbitration'. However, the other awards in the arbitral award ought to be left undisturbed and be registered as a judgment of the court for enforcement (see para 29).

(2) The High Court was plainly wrong in failing to invoke s 37(3) of the AA to sever and set aside only the 'overpayment and refund of same with interest' award in the arbitral award as that part of the arbitral award was clear, specific and distinct and was easily severable from the rest of the other awards. The High Court should not have set aside the whole arbitral award as the other awards contained within it were not objectionable and were made within the 'Terms of Submission to Arbitration' (see paras 31–32 & 34).

(3) The High Court judge erred in finding that there was no full disclosure by the arbitrator of the fact that he knew the witness for PKKS, namely Dr Mohinder Singh. The notes of proceedings showed that the arbitrator did make full disclosure of that fact. The disclosure was sufficient for LKH to have challenged the arbitrator's impartiality or independence under ss 14(3) and 15 of the AA and to object to the arbitrator continuing to preside over the proceedings. But LKH did not exercise that right and allowed the proceedings to continue to its end without objection. It was only when the decision did not go his way that LKH began questioning the arbitrator's independence and impartiality. LKH

was clearly estopped from doing so and his reliance on that ground to set aside the whole arbitral award was clearly an afterthought (see paras 40–41, 45–47, 51 & 54).

(4) LKH did not proffer any valid grounds to challenge PKKS's registration and enforcement of those parts of the arbitral award which were reinstated by this court. PKKS's appeal for the registration and enforcement of the valid parts of the arbitral award was therefore allowed (see para 58).

[Bahasa Malaysia summary

Perayu ('PKKS') mempunyai pertikaian dengan responden ('LKH'), seorang arkitek, mengenai baki yuran profesional yang perlu dibayar kepadanya untuk perkhidmatan yang diberikan dalam satu projek. Pihak-pihak merujuk pertikaian tersebut kepada penimbang tara untuk penyelesaian. Pada akhir perbicaraan hari pertama, selepas LKH memberikan keterangan, penimbang tara memaklumkan LKH bahawa beliau mengenali saksi seterusnya yang akan memberi keterangan untuk PKKS, iaitu Dr Mohinder Singh ('Mohinder') dan memandangkan fakta itu, beliau akan menangguhkan prosiding ke tarikh lain untuk memberi peluang kepada LKH untuk melantik peguam bagi prosiding itu atau memutuskan tindakan seterusnya. Pada tarikh seterusnya, LKH telah hadir bersama peguamnya tetapi mereka tidak membantah penimbang tara terus mempengerusikan timbang tara sehingga ke peringkat keputusan. Di akhir prosiding tersebut, penimbang tara memutuskan untuk memihak kepada PKKS dan memutuskan bahawa: (a) LKH hanya berhak menuntut RM747,250 sebagai yuran profesionalnya daripada PKKS dan beliau telah ditolak daripada menuntut sebarang amaun sebagai yuran profesional melebihi jumlah tersebut; (b) PKKS telah terlebih bayar LKH sebanyak RM72,750 dan jumlah itu perlu dikembalikan oleh LKH kepada PKKS dengan faedah pada kadar 5% setahun daripada tarikh keputusan timbang tara sehingga jumlah itu dibayar sepenuhnya ('lebihan bayar dan bayaran balik dengan faedah'); dan (c) LKH menanggung kos timbang tara. LKH memohon kepada Mahkamah Tinggi di bawah s 37(1) Akta Timbang Tara 2005 ('ATT') untuk mengenepikan award timbang tara manakala PKKS memohon di bawah s 38(1) ATT untuk mendaftarkan award tersebut sebagai penghakiman untuk melaksanakannya. Mahkamah Tinggi membenarkan permohonan LKH dan mengenepikan keseluruhan award timbang tara. Oleh itu, permohonan PKKS ditolak. Mahkamah Tinggi memutuskan bahawa award 'lebihan bayar dan bayaran balik dengan faedah' adalah di luar bidang kuasa penimbang tara untuk dibuat kerana ianya berada di luar 'Terma Rujukan kepada Timbang Tara'. Walau bagaimanapun, mahkamah memutuskan bahawa ianya tidak dapat membenarkan sebahagian award tersebut dan membatalkannya di bawah s 37(3) ATT dan, oleh itu, terpaksa mengenepikan keseluruhan award timbang tara. Mahkamah juga memutuskan bahawa penimbang tara telah melanggar s 14 ATT dengan tidak membuat

A 'pendedahan penuh dan tepat pada masanya' mengenai fakta bahawa dia mengenali Mohinder tepat pada permulaan prosiding timbang tara dan pendedahan tersebut hanya dibuat selepas LKH memberi keterangan. Mahkamah memutuskan bahawa ianya bercanggah dengan 'polisi awam' dan atas sebab itu keseluruhan award timbang tara perlu diketepikan di bawah
B s 37(1)(b)(ii) ATT.

Diputuskan, sebulat suara mengekalkan keputusan Mahkamah Tinggi yang mengenepikan keputusan award 'lebihan bayar dan bayaran balik dengan faedah', memasukkan semula kesemua award yang dibenarkan ketika
C prosiding timbang tara dan membenarkan rayuan PKS untuk mendaftarkan dan melaksanakan award tersebut seperti yang dipinda:

(1) Hakim Mahkamah Tinggi tidak terkhilaf dalam mengenepikan award the 'lebihan bayar dan bayaran balik dengan faedah' dalam award
D timbang tara kerana perkara itu adalah di luar skop 'Terma Rujukan kepada Timbang Tara'. Walau bagaimanapun, award lain dalam award timbang tara tidak harus diganggu dan perlu didaftarkan sebagai penghakiman mahkamah untuk melaksanakannya (lihat perenggan 29).

(2) Mahkamah Tinggi jelas terkhilaf apabila gagal membangkitkan s 37(3)
E ATT untuk memutuskan dan mengenepikan award 'lebihan bayar dan bayaran balik dengan faedah' sahaja dalam award timbang tara kerana bahagian award timbang tara itu adalah jelas, spesifik dan berbeza serta mudah diasingkan daripada award lain. Mahkamah Tinggi tidak sepatutnya mengenepikan keseluruhan award timbang tara kerana award
F lain yang terkandung di dalamnya tidak dibantah dan tidak bercanggah dengan 'Terma Rujukan kepada Timbang Tara' (lihat perenggan 31–32 & 34).

(3) Hakim Mahkamah Tinggi terkhilaf apabila memutuskan bahawa tiada
G pendedahan penuh oleh penimbang tara mengenai fakta bahawa beliau mengenali saksi PKKS, iaitu Dr Mohinder Singh. Nota prosiding menunjukkan bahawa penimbang tara membuat pendedahan penuh fakta tersebut. Pendedahan tersebut mencukupi bagi LKH untuk mencabar keadilan dan kebebasan penimbang tara di bawah ss 14(3) dan
H 15 ATT dan untuk membantah penimbang tara terus mempengerusikan prosiding. Tetapi LKH tidak melaksanakan hak tersebut dan membenarkan prosiding tersebut diteruskan hingga akhir tanpa bantahan. Hanya apabila keputusan tersebut tidak menyebelahinya, LKH mula mempersoalkan kebebasan dan keadilan penimbang tara
I tersebut. LKH diestop berbuat demikian dan kebergantungannya kepada alasan tersebut untuk mengetepikan keseluruhan award timbang tara jelas merupakan satu pemikiran semula (lihat perenggan 40–41, 45–47, 51 & 54).

(4) LKH tidak mengemukakan sebarang alasan yang sah untuk mencabar

pendaftaran PKKS dan perlaksanaan award timbang tara yang telah dikembalikan semula oleh mahkamah ini. Oleh itu, rayuan PKKS terhadap pendaftaran dan perlaksanaan bahagian-bahagian yang sah di dalam award timbang tara tersebut dibenarkan (lihat perenggan 58).]

Cases referred to

Dato' Dr Muhammad Ridzuan bin Mohd Salleh & Anor v Syarikat Air Terengganu Sdn Bhd [2012] 3 MLJ 737, HC (refd)
Garden Bay Sdn Bhd v Sime Darby Property Bhd [2018] 2 MLJ 636, CA (refd)
Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413, FC (refd)
Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126, CA (refd)
Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case [2015] 11 MLJ 841, HC (refd)
Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198, FC (refd)
Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic [2017] MLJU 1196; [2017] 9 CLJ 273, FC (folld)

Legislation referred to

Arbitration Act 2005 ss 14, 14(1), (2), (3), 14(3)(a), 14(4), 15, 15(1), 37(1), (1)(a)(iii), (1)(a)(iv), (1)(b)(ii), 37(3), 38, 38(1), 39

Appeal from: *Low Koh Hwa @ Low Kok Hwa (practising as sole chartered architect at Low & Associates) v Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan and another case* [2021] 10 MLJ 262 (High Court, Shah Alam)

Ankit R Sanghvi (Halim Hong & Quek) for the appellant.
Steven Wong Chin Fung (Arifin & Partners) for the respondent.

Ahmad Zaidi Ibrahim JCA:

INTRODUCTION

[1] This grounds of judgment covers two appeals ie Civil Appeal No B-02(C)(A)-202–01 of 2021 ('Appeal No 202') and Civil Appeal No B-02(C)(A)-203–01 of 2021 ('Appeal No 203'). Both the appeals were filed by the appellant, the Persatuan Kanak-Kanak Spastik Selangor dan Wilayah Persekutuan. The respondent in both the appeals is the same individual, En Low Koh Hwa @ Low Kok Hwa ('LKH').

[2] Onwards, the parties shall be referred to by their acronym ie, PKKS (Persatuan Kanak-Kanak Spastik Selangor dan Wilayah Persekutuan) and

A LKH (En Low Koh Hwa @ Low Kok Hwa). We shall also refer to the learned High Court judge as HCJ.

[3] Appeal No 202 is PKKS's appeal against the decision of the HCJ in allowing LKH's application to set aside the arbitration award ('the award') dated 12 February 2020 vide Originating Summons No BA-24C(ARB)-4–05 of 2020 (OS No 04). Whereas, Appeal No 203 is PKKS's appeal against the decision of the HCJ in dismissing the application by PKKS to enforce the same award vide Originating Summons No BA-24C-87–09 of 2020 (OS No 87).

C DECISION OF THE HIGH COURT

[4] The HCJ heard both OS No 04 and OS No 87 together and on 28 December 2020 delivered his decision which favoured LKH as follows:

D (a) Originating Summons No BA-24C(ARB)-4–05 of 2020 ('OS No 04') by LKH is allowed with costs. Hence, the whole award dated 12 Februray 2020 is set aside; and

(b) Originating Summons No BA-24C-87–09 of 2020 ('OS No 87') by E PKKS is dismissed with costs.

APPEAL NOS 202 AND 203

[5] Aggrieved by the abovesaid decisions, PKKS appealed to the Court of F Appeal vide Appeal No 202 dan Appeal No 203. Hence, both the appeals before us herein.

[6] The HCJ prepared one grounds of judgment for both OS No 04 and OS No 87. Hence, with the concurrence of all parties involved, we heard both G Appeal No 202 and Appeal No 203 at one go.

[7] Learned counsels for both sides agreed for Appeal No 202 be made the main appeal and that in the event Appeal No 04 is dismissed and the decision H of the HCJ is affirmed, Appeal No 203 shall then be academic and shall also be accordingly dismissed.

THE ARBITRATION PROCEEDING

I **[8]** Relating to the arbitration proceeding, the undisputed facts and chronology of events are as follows:

(i) PKKS appointed LKH, a certified architect for the re-construction of its spastic centre, Spastic Centre Petaling Jaya. The costs of the project totaled RM20m;

(ii) subsequently, disputes arose between PKKS and LKH as to the balance of the professional fees payable to LKH for the works/services rendered. LKH claimed that PKKS still owed him the amount of RM485,269.33 being the balance of his professional fees due and owing. PKKS disputed LKH's claim. Instead, PKKS claimed to had paid LKH the sum of RM868,600 which it averred to be more that enough for the works undertaken by LKH. The parties agreed to refer their said dispute to arbitration;

(iii) the arbitration proceeding went on for two days ie on 28 December 2019 and 30 December 2019. Initially, on the first date, LKH represented himself, whilst PKKS was represented by counsel;

(iv) what transpired on the first day of proceeding is this: on 28 December 2019, after LKH had finished giving evidence and before PKKS's witness Dato' Dr Mohinder Singh was to give his evidence, the arbitrator informed LKH that he is an acquaintance of the the said witness;

(v) following from the disclosure by the arbitrator, the arbitration proceeding was then adjourned to 30 August 2019 for continued hearing, to give a chance to LKH to appoint a lawyer to represent him on the next/proceeding date;

(vi) on 30 December 2019, LKH turned up with his counsel. There was no record to show that LKH or his counsel had raised any objection to the arbitrator, Ar Akbal Singh continuing to preside as arbitrator. Thus, the arbitration proceeded on before the same arbitrator until the end. On 12 February 2020 the arbitrator announced his final arbitration award (the award) which favoured PKKS. The award, in brief, are as follows:

(a) that LKH is only entitled to claim the amount of RM747,250 as professional fee from PKKS;

(b) that LKH is estopped from claiming from PKKS professional fee in excess of the amount of RM747,250;

(c) that PKKS had overpaid LKH the amount of RM72,750. Therefore, that amount overpaid shall be refunded by LKH to PKKS;

(d) that LKH shall pay interest at the rate of 5%pa on the amount overpaid from the date of the award until full realisation; and

(e) the costs of the arbitration totalling RM36,598 shall be paid by LKH.

A THE APPLICATIONS BEFORE THE HIGH COURT

[9] Flowing from the award above mentioned, LKH applied to set aside the said award pursuant to s 37(1) of the Arbitration Act 2005 ('the AA 2005') vide Originating Summons No BA-24C (ARB)-4–05 of 2020 ('OS No 4'). On the other hand, PKKS applied to register the said award for the purpose of enforcement under s 38(1) of the AA 2005 vide Originating Summons No BA-24C-87–09 of 2020 ('OS No 87').

FINDINGS AND DECISION BY THE HIGH COURT

[10] On 28 December 2020, the HCJ allowed LKH's application (OS No 04) and dismissed PKKS's application (OS No 87).

[11] Briefly, in allowing LKH's OS and in dismissing PKKS's OS the learned HCJ made the following findings:

(a) firstly, the award/order for 'overpayment' and 'interest on overpayment' (awards '(c)' and '(d)') is something outside and is in excess of the 'Terms of Submission to Arbritation' and therefore had breached s 37(1)(a)(iv) of the AA 2005. The learned HCJ referred to the case of *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273 in finding that s 37(1)(a)(iv) had been successfully invoked by LKH. The HCJ also referred amongst others to the High Court case of *Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case* [2015] 11 MLJ 841 which held as follows:

> Where the conditions of sub-para 37(1)(a)(iv) are met, the whole award will be set aside; and not just that part which is challenged; unless of course, if the same complaints can be raised under sub-para 37(1)(a)(v). This is clear from a plain reading of sub-paras 37(1)(a)(iv) and (v).

(b) secondly, the arbitrator had failed to make full and timeous disclosure of his relationship with PKKS's witness before the commencement of the arbitration proceeding and had only did so after LKH concluded his testimony.

[12] The HJC found that the arbitrator had acted unfairly and had breached 'public policy' in failing to made full and timeous disclosure of his relationship with PKKS's witness which according to the HCJ warrants the whole award to be set aside. The HCJ refered to amongst others, the following case authorities, *Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case*, *Garden Bay Sdn Bhd v Sime Darby Property Bhd* [2018] 2 MLJ 636 and *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198.

[13] The learned HCJ found s 37(3) of the AA 2005 to be inapplicable, to

sever the award for 'overpayment and interest for overpayment' from the rest of the award. Therefore, the HCJ set aside the whole of the award.

SUBMISSIONS OF THE PARTIES AT THE APPEAL STAGE

[14] On the whole, before us, learned counsels for both sides repeated/reiterated what they had submitted before the High Court on the law and facts for OS No 4 and OS No 87.

The appellant's (PKKS) submission

[15] For Appeal No 202 (setting aside) counsel submitted that it ought to be allowed as the HCJ had erred in ruling that the award/order on 'overpayment and interest for overpayment' is one that is outside the scope of the 'Terms of Submission to Arbitration' and that it is a new different which warrants the whole award to be set aside. According to counsel, even if the award on 'overpayment and interest for overpayment' is one that is outside the scope of the 'Terms of Submission to Arbitration', the learned HCJ should have only set aside that part of the award ie award/order (c) and (d) pursuant to s 37(3) of the AA 2005, instead of the whole award ie awards/orders (a), (b), (c), (d) and (e).

[16] Counsel referred to the decision in *Garden Bay Sdn Bhd v Sime Darby Property Sdn Bhd* on the doctrine of separability/severability in setting aside part of an arbitrator's award.

[17] Counsel further submitted that even if the award/order on 'overpayment and interest for overpayment' is one that is outside the scope of the 'Terms of Submission to Arbitration', since the award/order is one that is very clear and specific in nature, the said award/order can and should have been severed from the other awards/orders ie from prayers (a) and (d). In the circumstances, it was submitted that the learned HCJ was plainly wrong in failing to exercise his discretion under s 37(3) of the AA 2005.

[18] As to the application of s 14 of the AA 2005 against the arbitrator, counsel also submitted that the HCJ was clearly in error because LKH had failed to object to the arbitrator in continuing to arbitrate even after being informed by the arbitrator of his relationship with PKKS's witness. According to counsel s 15 of the AA 2005 clearly provides that any objection against the appointment of an arbitrator shall be made within 15 days from being made aware of the impugned facts.

[19] Hence, counsel submitted that LKH is estopped from raising any objection on the appointment of the arbitrator before the HCJ and/or herein at

A the appellate stage. Therefore, counsel submitted that Appeal No 202 should be allowed with costs.

The respondent's (LKH) submission

B **[20]** In response, as regard the award for 'overpayment and interest for overpayment', LKH's counsel submitted that the said award is inseverable from the other awards as a whole. Therefore, the HCJ did not err in not exercising his discretion under s 37(3) and instead of under s 37(1)(a)(iv) of the AA 2005.

C **[21]** Furthermore, counsel submitted that the learned HCJ did not err in ruling that the arbitrator had contravened s 14 of the when he failed to fully and timeously inform/notify parties of his relationship/acquaintance with the witnesses for PKKS, Dr Mohinder Singh. Consequentially, according to counsel, before the High Court, LKH is not estopped from raising objection
D relating to the appointment of Ar Akbal Singh Sandhu as arbitrator or to dispute his independence dan impartiality as arbitrator in the proceeding.

[22] In the circumstances, LKH's counsel submitted that the arbitrator's
E award had contravened public policy and therefore the learned HCJ was correct in invoking s 37(1)(b)(ii) AA 2005 which provides that:

> An award may be set aside by the High Court if —
>
> (a) ...
>
> F (b) the High Court finds that —
>
> (i) ...
>
> (ii) the award is in conflict with public policy of Malaysia.

G **[23]** Counsel submitted that the learned HCJ was correct in relying to the cases of *Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196; [2017] 9 CLJ 273 and *Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case* [2015] 11 MLJ 841 in finding that s 37(1)(a)(iv) had been successfully invoked by LKH.

H

[24] Thus, to recapitulate, counsel submitted that the decision and order of the HCJ in setting aside the whole award should be affirmed and be upheld. Therefore, counsel asked for Appeal No 202 to be dismissed with costs.

I **[25]** Predicated on the abovementioned, the main issues for our determination for Appeal No 202 are:

(i) whether the HCJ had erred in setting aside the whole award?

(ii) whether the HCJ erred in applying/invoking s 37(3) of the AA 2005?

(iii) whether Ar Akbal Singh as arbitrator had breached s 14 of the AA 2005? A

(iv) whether the HCJ erred in finding that the arbitrator had breached 'public policy' of Malaysia? and

(v) whether LKH is estopped from raising objection relating to the appointment of Ar Akbal Singh Sandhu as an arbitrator? B

OUR FINDINGS AND DECISION

[26] The Court of Appeal in the case of *Garden Bay Sdn Bhd v Sime Darby Property Bhd* states the following: C

> [12] It is now well settled that in Malaysia, the arbitrators' award is final, binding and conclusive and can only be challenged in exceptional circumstance. This jurisprudence is unique to Malaysia and is well articulated in s 36 of the AA 2005.

D

[27] Hence, for the appeals before us, to answer whether there exist any exceptional circumstances to warrant the HCJ to set aside the award wholly, the main issues as listed at paras [25](i), (ii), (iii), (iv) and (v) aforesaid need to determined and after having appraised the appeal records and having considered the submissions by counsels for both sides, our findings to the issues raised are as follow: E

Issues (i) and (ii): Whether the HCJ had erred in setting aside the whole award? Whether the HCJ erred in applying/invoking s 37(3) of the AA 2005?

F

[28] To start with, we refer to the case of *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126 wherein it was held as follows:

> ... the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of the mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties ... G

[29] Based on the principle abovementioned, it is noteworthy that during submission before us, learned counsel for PKKS conceded that awards/orders (c) and (d) ie, for 'overpayment and interest for overpayment' are awards/prayers outside and beyond the scope and the 'Terms of Submission to Arbitration'. Hence, we agreed with LKH's counsel that the learned HCJ did not err in setting aside the awards/orders (c) and (d). However as to the the awards ie awards (a), (b) and (e), in our considered view, the awards (a), (b) and (e) ought to be left undisturbed and be registered as judgement of the court for enforcement. H I

[30] In our view, that would be in line with the policy and international

practice which encourages finality to the process and awards of arbitration by limiting and minimising interference by the courts. In the case of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 the Federal Court said as follows:

> ... The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITAL Model Law. The effect of ss 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award.

[31] Although we agreed with the learned HCJ that the awards pertaining to 'overpayment' (award '(c)' and '(d)') should be set aside for being one that is outside the scope of reference to the arbitration, we are not able to agree with His Lordship decision to set aside the award wholly. In our considered view, since the award pertaining to 'overpayment' is very clear, specific and distinct, it can easily be severed from the rest of the other awards. As such we find, in the circumstances the HCJ had erred and was plainly wrong in failing to invoke s 37(3) of the AA 2005 which stipulates:

> Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of that award which contains decisions on matters not submitted to arbitration may be set aside.

[32] Based on the facts and circumstances as a whole and the principal abovesaid, we agreed with learned counsel for PKKS that the HCJ had erred in invoking s 37(1)(a)(iv) of the AA 2005 and in not applying s 37(3) of the AA 2005 instead. In our considered view, s 37(3) of the AA 2005 is clearly applicable and ought to have been invoked by the learned HCJ. We refered and applied the principle as decided in the Federal Court case of *Thai-Lao Lignite Co Ltd dan Anor v Government of the Lao People's Democratic Republic* wherein Jeffrey Tan FCJ at para 197 said:

> [197] ln relation to 'the award deals with dispute not contemplated by or not falling within the terms of the submission to arbitration' and 'the award contains decisions on matters beyond the scope of the submission to arbitrator', *William & Kawharu* at 17.5.4 thus commented on the first limb of art 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of section 37(1)(a)(iv) and (v) of AA 2005):
>
> > This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but exceeded the authority by dealing in the award with matters that go beyond the terms of the arbitration agreement or the scope of the issues referred by the parties for resolution. The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties that the parties have plainly put in issue ... *If the tribunal exceeds its authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration.* (Emphasis added.)

[33] Coming back to the appeals before us, it is our considered view that, that award/order (c) and (d) which concerned matters outside the ambit of the 'Terms of Submission to Arbitration' can be easily severed from the other awards/orders viz award/order (a), (b) and (e).

[34] We are minded of the principle that the exercise of discretion by the court should not be disturbed. We are of the considered view that the learned HCJ ought to have invoke s 37(3) of the AA 2005 which gives the court the discretion to set aside only any award which was erroneously handed down in excess of the 'Terms of Submission to Arbitration' and simultaneously maintaining other awards/order made within the said 'Terms of Submission to Arbitration'. Hence, we find that the learned HCJ was plainly wrong in ruling that the award/order on 'overpayment' is inseverable and in using s 37(1)(a)(iii) of the AA 2005 instead. Therefore, on the facts and circumstances, we find only award/order (c) and (d) should be set aside, whereas, award/order (a), (b) and (e) should be maintained.

Issue (iii)–(iv): Whether the HCJ had erred in finding that the arbitrator had breached the 'public policy' of Malaysia? Whether Ar Akbal Singh as arbitrator had breached s 14 of the AA 2005?

[35] Issues (iii)–(iv) are inter-related. Hence, they are taken together.

[36] Apart from finding that the arbitartor had contravened s 37(1)(a)(iii) of the AA 2005, the HCJ also found that s 37(1)(b)(ii) of the AA 2005 had been breached. The undisputed facts of our case showed that the arbitrator only informed LKH of his relationship with Dr Mohinder Singh, a witness and representative of PKKS only on the first date of proceeding. Based on the facts aforesaid, the HCJ ruled that the arbitrator failed to make full and timeous disclosure of his relationship which he is obliged to do pursuant to ss 14(1) and (2) of the AA 2005 which provides as follows:

> (1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence.
>
> (2) An Arbitrator shall, without delay, from the time of appointment and throughout the arbitral proceedings, disclose any circumstances referred to in subsection (1) to the parties unless the parties have already been informed of such circumstances by the arbitrator.

[37] Section 14(3) provides:

> (3) An Arbitrator may be challenged only if:
>
> (a) the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence;

[38] The learned HCJ found that although the arbitrator did disclose to LKH of his relationship with Dr Mohinder Singh on the 28 August 2018, he had failed to disclose fully all the relevant information pertaining to his relationship with PKKS's witnesses and therefore had contravened s 14 of the AA 2005 and had breached 'public policy' under s 37(1)(b)(ii) of the AA 2005. For the abovesaid reasons, the HCJ decided that the whole award of the arbitrator ought to be set aside. The HCJ referred to the case of *Dato' Dr Muhammad Ridzuan bin Mohd Salleh & Anor v Syarikat Air Terengganu Sdn Bhd* [2012] 3 MLJ 737.

[39] We agreed with the HCJ as to the duty to make full and timeous disclosure imposed by the Act on the arbitrator. We also concurred with the HCJ that the arbitrator failed to declared of his relationship with Dr Mohinder Singh before the proceeding commences. However, we are unable to agree with the HCJ that the arbitrator did not make full disclosure of his relationship with PKKS's witness. The HCJ in para 29(2) grounds of judgment said the following:

> (2) The arbitrator could have made a belated full disclosure of the arbitrator's relationship on the first day of the hearing. Inexplicitely, the arbitrator did not do so.

[40] We are of the view that the HCJ had plainly erred in His Lordship's finding that there was no full disclosure by the arbitrator. Based on the notes of proceeding, in our considered view, the arbitrator had disclosed fully the crucial information ie of his relationship with Dr Mohinder Singh. In our view, the declaration/information by the arbitrator of his relationship/acquaintance with the said witness is more than enough/sufficient to trigger a concern of impartiality or independence of the arbitrator, for LKH to raise a complaint and to invoke s 15 of the AA 2005 which provides as follows:

> 15(1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

[41] Section 14(3) provides:

> (3) An Arbitrator may be challenged only if:
>
> (a) ...
>
> (b) the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence;

[42] In fact, if we were to scrutinise the notes of proceeding dated 28 August 2018 concerned, it shows that even earlier on, the arbitrator had already informed LKH of his relationship with Dr Mohinder Singh and what the

arbitrator did after Dr Mohinder Singh gave evidence and before LKH was to testify was to repeat/reiterate what he had declared earlier. That particular notes of proceeding states as follows:

> Arbitrator: Datuk (Mohinder), you can take your seat. Low, *like I told you*, I know Datuk (Mohinder), but it is not Spastik. So, it is inevitable that in this field, we know counsels (sic), we know about each other. (Emphasis added.)

[43] It is our considered view that even though the arbitrator did not make the required declaration 'timeously' pursuant to s 14 of the AA 2005, we are unable to agree with the HCJ that there was no full disclosure. On the contrary we find that the arbitrator had declared to LKH the most crucial fact and information ie that he knew/was an acquaince of Dr Mohinder Singh of PKKS.

[44] Hence we are of the considered view that the HCJ was plainly wrong and had misdirected himself in invoking s 14 of the AA 2005. We find no exceptional circumstances to warrant the HCJ to set aside the whole award.

Issue (v): Whether LKH is estopped from raising objection relating to the appointment of Ar Akbal Singh Sandhu as an arbitrator?

[45] As mentioned earlier on, we found that the arbitrator had on 28 August 2019 disclosed fully of his relationship with Dr Mohinder Singh. In our view, if LKH was genuinely concerned with the arbitrator's independence and impartiality, then he should have exercised his right and objected to the arbitrator's appointment and from him continuing to arbitrate. Section 14(3)(a) of the AA 2005 which accorded LKH with that right and option to object provides the following:

> (3) An arbitrator may be challenged only if —
>
> (a) the circumstances gives rise to justifiable doubts as to that arbitrator's impartiality or independence; or
>
> (b) ...

[46] The abovementioned disclosure by the arbitrator, in our view, provided to LKH the avenue object under s 15(1) of the AA 2005 which provides as follows:

> 15(1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

[47] However, the undisputed facts revealed that LKH failed to exercise that right. Instead, LKH opted to proceed on with the arbitration before the same

arbitrator and it was only when the arbitrator's award/decision did not go his way that LKH, raise the issue as to the independence and impartiality of the arbitrator before the High Court.

[48] In our view, what can be deduced from LKH's conduct in not objecting to the continued appointment of the arbitrator even after being made aware of the arbitrator's relationship with PKKS's witness, is that it shows that LKH had full faith in the arbitrator independence and impartiality. Hence, eventhough the arbitrator's disclosure was only made to LKH on 28 December 2019, we do not think that LKH was ever prejudiced and that there was no contravention/breach of public policy, in the circumstances.

[49] The learned HCJ failed to consider the failure by LKH to object to the arbitrator's appointment or to the arbitrator continuing to arbitrate, despite the disclosure to the arbitrator on 28 August 2019. On this issue, s 14(4) of the AA 2005 provides the following:

> A party may challenge an arbitrator the appointment of that party, or in whose appointment that party has participated, only for reasons which that party becomes aware of after the appointment has been made.

[50] In our case, on 28 August 2018, after having disclosed to LKH, the arbitrator gave an opportunity to LKH to engage a lawyer. In our considered view, the conduct by the arbitrator manifested him as being just and impartial and the fact that LKH did not contemporaneously object or applied for the recusal/termination of the arbitrator for further sitting in the arbitral proceeding, showed that LKH did not doubt the arbitrator's ability, independence and impartiality. The fact that the arbitrator did not hide/conceal the fact relating to his acquaintance with PKKS's witness, proved that he was being forthright. Had LKH doubted the independence and impartiality of the arbitrator then, he would certainly have objected promptly.

[51] Thus, counsel for PKKS submitted that LKH should be estopped from raising objection relating to the appointment or to the continuation of the arbitrator at the High Court. We are in in agreement with the counsel for PKKS. In our view, any objection relating to the appointment or status of an arbitrator, the statutory provision applicable is s 15(1) of the AA 2005 which mandated objection to be made within 15 days of the date of such disclosure. In our view, the action by LKH in only raising issue/objection the appointment of the arbitrator before the High Court vide OS No 04, is clearly an attempt to circumvent the provision of s 15(1) of the AA 2005, which to us is an abuse of process of court.

[52] We also observed that on 30 December 2019 LKH had engaged counsel to represent him on the subsequent date fixed for continued hearing of the

arbitral proceeding and that his counsel too did not challenge/object to the arbitrator to continue as with his function. Hence, not only did LKH not object/challenge under s 15(1) August AA 2005, LKH had opted to proceed on with the arbitration proceeding in front of the same arbitrator. LKH only raise objection against the arbitrator, including for breach of s 14 August AA 2005 before the High Court, when the decision before the arbitrator did not favour him.

[53] Therefore, after having agreed earlier on to have the arbitrator to remain and to proceed to arbitrate his claim against PSSK, in our view, LKH cannot be permitted to make a sudden 'U-Turn' and to thereafter bring up allegation of biasness and/or partiality on the part of the same arbitrator, when the decision went against him.

[54] In the upshot, we are of the view that the action by LKH in challenging the independence and impartiality of the arbitrator as one of the grounds to set aside the whole award vide OS No 04 clearly an afterthought.

[55] Hence, we find that the learned HCJ had committed an appellable error and was plainly wrong in allowing LKH's application to set aside the whole award on the basis that there was clear/apparent biasness on the part of the arbitrator.

CONCLUSION

Appeal No 202 (Originating Summon No 87)

[56] For Appeal No 202 (for OS No 04), we allowed the the appeal in part that is, award/order (a), (b) and (e) is reinstated. The decision/order of the High Court in setting aside award/order (c) and (d) is affirmed.

Appeal No 203 (Originating Summon No 87)

[57] Vide OS No 87, PKKS applied under s 38 of the AA 2005 to enforce the award. Consequent to decision/order of the High Court setting aside the whole award, OS No 87 was ruled to be academic. Therefore, without having to consider Appeal No 203, the High Court dismissed OS No 87 by PKKS with costs.

[58] Thus, for Appeal No 203, after having appraised the appeal records and the submissions by counsels, we find that PKKS had succeeded in proving the ingredients/elements of s 38 of the AA 2005. Conversely, we find that LKH failed to proffer any valid grounds to the contrary, in challenging the registration and enforcement under s 39 of the AA 2005. Thus, Appeal No 203

A we allowed award/order (a), (b) and (e) to be enforced pursuant to s 38 of the AA 2005.

Costs

B **[59]** In the circumstances, we gave costs of RM5,000 for each appeal to the appellant/PKKS, subject to allocator.

High Court's setting aside of the 'overpayment and refund of same with interest' award affirmed; all other awards that were made in the arbitral award and C *allowing PKKS's appeal to register and enforce the arbitral award as amended reinstated.*

Reported by Ashok Kumar

D

E

F

G

H

I